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No. 82-342

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PHILKO AVIATION, INC.,

Petitioner,

vs.

MAURICE SHACKET and SYLVIA SHACKET,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

A. Whether recordation of a conveyance with the Federal Aviation Administration, which conveyance was void under state law, vests any title to an aircraft.

B. Whether petitioner can present issues never raised in the lower court as a basis for granting its petition for writ of certiorari.

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RESPONDENTS' BRIEF IN OPPOSITION

The respondents, Maurice Shacket and Sylvia Shacket, respectfully urge that this Court deny the Petition For Writ of Certiorari to review the Judgment and the Opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on June 22, 1982 and reported in 681 F.2d 506 (7th Cir. 1982).

STATEMENT OF THE CASE

The Statement Of The Case presented by Philko Aviation, Inc. ("Philko") represents little more than a total distortion of the facts found by both the District Court

and the Court of Appeals in their respective decisions in this action. The following represents a chronology of undisputed facts which Philko Aviation has simply failed to advise this Court of. Respondents believe these facts are necessary to enable this Court to render a decision on Philko's Petition For Writ Of Certiorari to the United States Court of Appeals.

Background

Roger Smith Aircraft Sales, Inc. ("Smith Aircraft") was, for many years, engaged in the business of buying and selling aircraft, as well as chartering aircraft. Smith Aircraft was located and operated at the DuPage County Airport. In 1977, Roger Smith, President of Smith Aircraft, desired to move his operations to another location and became interested in purchasing a company called Philko Aviation, Inc. ("Philko"), located at the Aurora Municipal Airport. Philko sold oil and gas, operated a flight school, performed aircraft maintenance and repairs, and sold aircraft. Smith could not afford to purchase Philko, so he sought a financial backer to assist in the acquisition. That financial backer was Edward J. McArdle. McArdle eventually purchased Philko and turned Philko's day-to-day business operations over to Roger Smith and Smith Aircraft under a so-called "lease arrangement". Under that arrangement, Smith Aircraft continued existing operations of Philko and Philko's name, accounting to Philko for all expenses and receipts. Smith Aircraft was permitted to use Philko's buildings for the operation of Smith Aircraft's aircraft sales and charter businesses. Smith Aircraft also bought and sold aircraft for Philko. McArdle's relationship with the President of Smith Aircraft did not end with the lease arrangement between the two companies. McArdle lent his personal credit, as well as the credit of other McArdle companies, to assist Smith Aircraft by

guaranteeing obligations of Smith Aircraft and making loans to Smith Aircraft. Eventually McArdle attempted to purchase Smith Aircraft from Smith.

The Transaction Between Philko And Smith Aircraft

On April 22, 1978, just two days after Smith turned over possession of the aircraft to the Shackets at closing, Smith approached McArdle, stating he needed $152,000 to pay the balance of the purchase price to Clark Aviation for the same aircraft he had sold and delivered to the Shackets. Smith told McArdle the aircraft was then to be sold by Smith to Krueger Aviation, a California corporation. Smith told McArdle that, upon consummation of the sale to Krueger Aviation, Smith would be able to pay off a $60,000 loan from Philko to Smith Aircraft as well as the $152,000 loan being obtained from the bank. McArdle was shown the original bills of sale as well as the bills of sale to Philko from Smith Aircraft for the aircraft. By his own testimony, McArdle, President of Philko, stated that his activities with Smith were merely to facilitate Smith Aircraft's transaction with Krueger Aviation. McArdle had no interest in the sale price to be paid by Krueger for the same aircraft which Smith was purportedly selling Philko, except to make certain that it was adequate to pay the bank loan of $152,000 and the $60,000 loan owed to Philko. Whatever profit that was realized in the Krueger transaction would inure solely to the benefit of Smith Aircraft. The entire transaction between Smith Aircraft and Philko Aviation took place during one meeting on April 22, 1978. At no time did either the bank or Philko question Smith regarding his possession of bills of sale without having fully paid Clark Aviation for the aircraft nor did the bank or Philko attempt to verify Smith Aircraft's claim that the aircraft was being fitted with certain equipment.

REASONS FOR DENYING THE WRIT

1.

UNDER FEDERAL LAW, THE MERE RECORDATION BY PHILKO AVIATION OF A CONVEYANCE VOID UNDER STATE LAW DOES NOT DIVEST THE SHACKETS OF TITLE TO THEIR AIRCRAFT.

Contrary to Philko's repeated suggestions, this case does not present a conflict between state and federal law concerning title disputes to aircraft. The federal law in the area of recordation of title merely demonstrates Congress' intent to establish a central filing system for the registering of documents of title and security documents for aircraft and is not intended to decide title disputes to aircraft. Rather, under federal law, Congress has wisely designated that state law should control title disputes between claimants. In *Sanders v. M.D. Aircraft Sales, Inc.*, 575 F.2d 1086, 1088 (3d Cir. 1978), the court noted:

> [T]here has been preemption by federal law only to the limited extent that Congress has sensibly federalized choice of law, thereby freeing aircraft financing from forum shopping which the rule of *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941), might otherwise produce.

Under Title 49 U.S.C. §1401(f), the registration of any document of title shall not be evidence of ownership of an aircraft in any proceeding in which such ownership by a particular person is, or may be, an issue. Despite this statutory language, which appeared to leave title questions to state law, some courts had held that the federal recordation statute for aircraft preempted state law on the transfer of title. *Marsden v. Southern Flight Service, Inc.*, 227 F. Supp. 411 (M.D.N.C. 1961); *Blalock v. Brown*, 78 Ga. App. 537, 51 S.E.2d 610 (1949). To

clarify Congressional intent not to preempt state law in determining the underlying validity of any conveyance or instrument relating to an aircraft, Congress amended the statute by adding Section 506 of the Federal Aviation Act, 49 U.S.C. §1406, which provides as follows:

> *The validity of any instrument the recording of which is provided for by section 1403 of this title shall be governed by the laws of the State, District of Columbia,* or territory or possession of the United States in which such instrument is delivered, irrespective of the location of the place of delivery of the property which is the subject of such instrument. Where the place of intended delivery of such instrument is specified therein, it shall constitute presumptive evidence that such instrument was delivered at the place so specified. (Emphasis added)

The Senate report addressing the intent of this statute states:

> The bill would create a uniform federal rule which would provide that the validity of certain instruments affecting title or interest in aircraft shall be governed by the laws of the State, District of Columbia, or territory or possession in which they are delivered. Designation of the place of delivery in the instrument would constitute presumptive evidence that the instrument was delivered at the place so specified.
>
> Analysis and Need for Legislation.
>
> It establishes a uniform federal rule governing the validity of the instruments affecting title to or interests in aircraft and related equipment. The rule would apply to all instruments subject to the recording provisions of Section 503 of the Federal Aviation Act. Included would be various instruments executed for security purposes such as conveyances, leases, mortgages, equipment trusts, conditional sales contracts, etc. Assignments and amendments and supplements to such instruments would

> similarly be covered. *To determine the validity of such an instrument, one would need only look to the substantive law of the particular state in which the relevant instrument was delivered.* See *U.S. Code Congressional and Administrative News* 1964, Vol. 2, Pages 2319 to 2320. (Emphasis added)

Clearly, Congress did not intend to preempt state law as to the validity of a conveyance evidenced by instruments which are recordable under Section 1403. Philko has, however, conveniently chosen to ignore this point throughout this litigation. Although Philko relies heavily upon its recording a bill of sale with the FAA, which purported to convey the Shacket aircraft from Smith to Philko this fact is of no consequence for the conveyance was invalid under state law.

The bill of sale between Smith Aircraft and Philko recites that Smith Aircraft was conveying all its right, title and interest to a certain aircraft. However, at the time of the execution of that bill of sale, Smith Aircraft had no interest in the aircraft. Under state law, title had already passed to the Shackets upon the physical delivery of the aircraft. *See Humphrey Cadillac and Oldsmobile Co. v. Sinard*, 85 Ill. App. 2d 64, 229 N.E.2d 365 (1st Dist. 1967); *Texas National Bank v. Aufderheide*, 235 F. Supp. 599, 603 (E.D. Ark. 1964). Moreover, Philko had no intent to take title to this aircraft but, rather, the transaction between Philko and Smith Aircraft was merely a credit transaction. Although the bill of sale between Smith Aircraft and Philko recites Philko as the purchaser, it is clear from the facts of this case that Philko was never intended to be a purchaser. McArdle, the President of Philko, acknowledged that the entire economic benefit of the Krueger Aviation purchase (not just the $60,000 which was used to pay off Smith Aircraft's debt to Philko) was going to go to Smith Aircraft, not Philko. McArdle clearly stated that

all the funds from the sale after payment of the $152,000 bank loan and the $60,000 debt would be for the sole benefit of Smith Aircraft.

As the foregoing demonstrates, Philko was not, under state law, a buyer of the Shackets' aircraft since Philko was merely extending credit to Smith Aircraft. Philko was not a buyer in the ordinary course of business, since "buying" under U.C.C. §1-201(9) specifically excludes transfers "as security for or in total or partial satisfaction of a money debt." Since buying does not include a security transfer, Philko simply cannot be a buyer in the ordinary course of business. Nor could Philko acquire title as a good faith purchaser for value since Philko failed to take possession of the aircraft. Under U.C.C. §2-403(1) one cannot be a good faith purchaser for value absent possession of the property. Manifestly, the purported conveyance between Smith Aircraft and Philko was totally invalid under state law.

Unable to dispute the logic of the foregoing, Philko attempts to save the validity of the purported conveyance by claiming that, notwithstanding the dictate of state law, the mere recording of the bill of sale between Smith Aircraft and Philko provides it with title to an aircraft. This argument is fatally flawed. Since Congress has determined that state law will control questions of title to aircraft, the federal recordation of an instrument will not make a transaction in an aircraft valid if that transaction, as determined by state law, conveys no interest in the aircraft. *CIM International v. United States*, 641 F.2d 671, 675 at fn. 6 (9th Cir. 1980). Furthermore, the implication by Philko that an instrument must be recorded in order to look to substantive state law is unsupported by the plain language contained in §1406, as well as its accompanying legislative history. Indeed, Philko's novel proposition is di-

rectly contradicted by numerous courts which have held that state law is to be applied in determining the inherent validity for any conveyance or encumbrance related to an aircraft. *Bitzer-Croft Motors, Inc. v. Pioneer Bank & Trust Co.*, 82 Ill. App. 3d 1, 401 N.E.2d 1340 (5th Dist. 1980); *Bank of Hendersonville v. Red Baron Flying Club*, 571 S.W.2d 152 (Tenn. App. 1977), *cert. denied* (Tenn. 1978), *cert. denied*, 439 U.S. 1089 (1979); *Northern Illinois Corp. v. Bishop Dist. Co.*, 284 F. Supp. 121 (W.D. Mich. 1968); *United States Aviation Underwriters, Inc. v. WTAE Flying Club*, 300 F. Supp. 341 (W.D. Pa. 1969); *Suburban Trust & Savings Bank v. Campbell*, 19 Ohio Misc. 74, 250 N.E.2d 118 (1969); *Southern Jersey Airways, Inc. v. National Bank of Secaucus*, 108 N.J. Super. 369, 261 A.2d 399 (1970); *Carolina Aircraft Corp. v. Commerce Trust Co.*, 289 So. 2d 37 (Fla. App. 1974); *Industrial National Bank v. Butler Aviation International, Inc.*, 370 F. Supp. 1012 (E.D.N.Y. 1974); *Idabel National Bank v. Tucker*, 544 P.2d 1287 (Okla. App. 1975), *cert. denied* (Okla. 1975); *Catlin Aviation Co. v. Equilease Corp.*, 626 P.2d 857, (Okla. 1981). *In re Holiday Airlines Corp.*, 620 F.2d 731 (9th Cir. 1980) *cert. denied*, 449 U.S. 900 (1980).

Philko Aviation, however, argues that the application of Section 506 of Federal Aviation Act (Title 49 U.S.C. 1406) is limited to disputes relating to recorded instruments. The cases cited by Philko Aviation do not support that contention but, rather, sustain the principle that Congress has directed the courts to look to state law to determine competing interests in aircraft. In *CIM International v. United States*, 641 F.2d 671 (9th Cir. 1980), the government argued that Section 506 of Federal Aviation Act applied only to instruments which were on file with the FAA. In rejecting that contention, the Court stated:

* * *

> The government asserts that section 1406 relates only to determination of the validity of interests which are in fact on file with the FAA. That view rests on the government's basic, and erroneous, premise that no unfiled interests can ever be invalid and would leave no law applicable to unfiled interests. Such a limited view of section 1406 is compelled by neither its language nor its legislative history.
>
> We need not discuss at length the parties' contentions on whether section 1403 "preempts" state law, in whole or in part, respecting the interests in aircraft. This court has held that, though Section 1403 may govern priority, matters touching validity of interests in aircraft under section 1403 are determinable in reference to state law.

Id. at 675 n. 6.[1]

Similarly, in *Haynes v. General Elect. Credit Corp.*, 432 F. Supp. 763 (W.D. Vir. 1977), *aff'd* 582 F.2d 869 (4th Cir. 1978), relied upon by Philko, the court stated: "Questions such as the validity of title documents, good faith purchasers status and the like, must be resolved under state law." Philko conveniently omitted to cite to this language in the *Haynes* opinion but, rather, chose to distort the language of the district court's opinion. In summary, it is clear even from the cases cited by Philko to this Court in support of its Petition, that the validity of the transaction between Philko and Smith Aircraft, as evidenced by the recorded bill of sale, must be determined by state law.

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[1] It is interesting to note that the author of the CIM opinion, Chief Judge Markey, Chief Judge, United States Court of Customs and Patent Appeals, was also the author of the opinion in this case for the United States Court of Appeals for the Seventh Circuit.

In a last ditch effort to avoid the clear weight of judicial authority which invalidates the conveyance between Philko and Smith Aircraft, Philko claims that, if this case had been filed in California, Oklahoma, Florida, or North Carolina, an opposite result would have occurred. That is simply not true. The validity of the transfer from Smith Aircraft to Philko would be determined the same in those states as the decision rendered in the Court of Appeals below.

For example, in *Catlin Aviation Co. v. Equilease Corp.*, 626 P.2d 857 (Okla. 1981), the Oklahoma Supreme Court stated that if an instrument is void under state law, federal recordation would not save it. Thus, even under Oklahoma law, because the transfer between Philko and Smith Aircraft is void under state law, the fact that Philko recorded it with the FAA would not transfer title of the Shackets' aircraft to Philko. Similarly, in *O'Neill v. Barnett Bank of Jacksonville*, 360 So. 2d 150 (Fla. App. 1978), the buyer knew that the aircraft being sold by the seller was for rental purposes and he knew that it was not part of the seller's sales inventory. The court held that the buyer was not a buyer in the ordinary course of business and the court recognized that the substantive validity of any instrument affecting an aircraft was to be determined by the laws of the state in which the instrument is delivered. Clearly, the result in *O'Neill* compels the conclusion that Florida courts would have to determine the validity of the transfer of the aircraft between Philko Aviation and Smith Aircraft by reference to Florida state law.

Finally, in *Dowell v. Beech Acceptance Corporation*, 91 Cal. Rptr. 1, 476 P.2d 401 (1971), *cert. denied*, 404 U.S. 823 (1971) the Court held that a properly registered security interest was enforceable against a buyer in the ordinary course who subsequently purchased an aircraft. Although the decision represents a distinct minor-

ity view on that issue, the California court was not faced with issues questioning the validity of the security interest at the time it was recorded with the FAA. That decision is inappropriate to the matters at issue here. *Dowell* simply does not address the issue of whether the recordation of an instrument void under state law conveys any right in an aircraft. Had *Dowell* been confronted with the precise issue, it is submitted that it would follow the clear weight of authority and apply state law to determine the validity of an instrument recorded with the FAA.[2]

As demonstrated herein, the decision of the Court of Appeals for the Seventh Circuit properly applied federal law by applying state law to the transaction between Philko Aviation and Smith Aircraft. No conflict between state and federal law exists in this matter, nor is preemption at issue.

2.

THIS COURT SHOULD NOT GRANT A WRIT OF CERTIORARI ON QUESTIONS THAT WERE NEVER PRESENTED TO THE LOWER COURT.

For the first time in this litigation, Philko Aviation suggests that a private right of action should exist for the failure by the Shackets to record the conveyance of the aircraft from Smith Aircraft to the Shackets.[3] Phil-

[2] The only decision cited to this Court relating to North Carolina law is *Marsden v. Southern Flight Service, Inc.*, 227 F. Supp. 411 (M.D.N.C. 1961). That case predated the adoption of Section 506 of Federal Aviation Act and is, therefore inapplicable.

[3] It is, indeed, disingenuous for Philko to suggest that it should have a cause of action against the Shackets for their alleged failure to record their conveyance with the FAA. The transaction between Philko and Smith Aircraft occurred in only one meeting. That transaction, as demonstrated by the

(Footnote continued on following page)

ko further contends that Shackets should be estopped from claiming title to the aircraft by failing to obtain the original bills of sale. None of these issues were presented to the lower court for decision. This Court ordinarily does not decide questions not raised or resolved in the lower court. *State v. Taylor*, 353 U.S. 553, 556, n. 2, 77 S. Ct. 1037, 1 L. Ed. 2d 1034 (1957); *Lawn v. United States*, 355 U.S. 339, 363, n. 16, 78 S. Ct. 311, 324, 2 L. Ed. 2d 321 (1958). Since Philko never presented either of these issues before the District Court or the Court of Appeals, it is submitted that it cannot present such issues to the Supreme Court for the first time as grounds for this Court to grant its Petition For Writ Of Certiorari to the United States Court of Appeals for the Seventh Circuit.

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[3] *continued*

facts of this case, was merely a credit transaction in an attempt by McArdle to secure repayment of a $60,000 loan from Smith Aircraft, which had serious financial problems. In light of the fact that Philko Aviation never checked with or made any attempt to check with the FAA as far as the recordation of title, its newly discovered "claim" that it reasonably relied on the state of the title with the FAA is sheer sophistry.

Nor did Philko Aviation, through its President, McArdle, make any effort to verify the story that Smith Aircraft had its equity already invested in the plane. McArdle was advised that Smith Aircraft lacked possession of the plane at the time the transaction occurred. As the District Court noted, had McArdle made a single inquiry of Clark Aviation, seller of the aircraft to Smith Aircraft, the Shackets' rights would have been disclosed. That Philko closed its eyes, through lack of its own diligence, to what otherwise would have been obvious, is hardly a basis for predicating liability upon the Shackets.

CONCLUSION

Based upon the foregoing, respondents, Maurice Shacket and Sylvia Shacket, request that this Court deny the Petition For Writ Of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

STATUTES INVOLVED

Ch. 20 Nationality And Ownership 49 § 1401

SUBCHAPTER V—NATIONALITY AND OWNERSHIP OF AIRCRAFT

§ 1401. Registration of aircraft nationality

Effect of registration

(f) Such certificate shall be conclusive evidence of nationality for international purposes, but not in any proceeding under the laws of the United States. Registration shall not be evidence of ownership of aircraft in any proceeding in which such ownership by a particular person is, or may be, in issue.

Pub.L. 85-726, Title V, § 501, Aug. 23, 1958, 72 Stat. 771.

Ch. 20 Nationality And Ownership 49 § 1406

§ 1406. Law governing validity of certain instruments

The validity of any instrument the recording of which is provided for by section 1403 of this title shall be governed by the laws of the State, District of Columbia, or territory or possession of the United States in which such instrument is delivered, irrespective of the location or the place of delivery of the property which is the subject of such instrument. Where the place of intended delivery of such instrument is specified therein, it shall constitute presumptive evidence that such instrument was delivered at the place so specified.

Pub.L. 85-726, Title V, § 506, as added Pub.L. 88-346, § 1(a), June 30, 1964, 78 Stat. 236.

26 § 1-201. Commercial Code

(9) "Buyer in ordinary course of business" means a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind but does not include a pawnbroker. "Buying" may be for cash or by exchange of other property or on secured or unsecured credit and includes receiving goods or documents of title under a pre-existing contract for sale but does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt.